No. 80-1114

FILED
MAR 20 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

GLASSBORO SERVICE ASSOCIATION, INC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner may count the cost of transporting farm workers from Puerto Rico to the mainland toward the minimum wage due its workers under the Fair Labor Standards Act of 1938.

2. Whether an agreement between the Secretary of Labor of Puerto Rico, acting on behalf of Puerto Rican employees, and petitioner is a "bona fide collective-bargaining agreement" within Section 3(m) of the Fair Labor Standards Act of 1938, which does not permit an employer's payments for board, lodging, and facilities excluded from wages by a collective bargaining agreement to be counted toward the minimum wage due its employees.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a) is unreported. The initial opinion of the district court (A. 108-119)[1] is not officially reported; it is unofficially reported at 87 Lab. Cas. (CCH) para. 38,865. The opinion of the district court denying the motion for reconsideration (A. 122-124) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1980. The petition for a writ of certiorari was filed on January 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "A." refers to the joint appendix filed in the court of appeals.

STATEMENT

The Secretary of Labor brought this action against petitioner in the United States District Court for the District of New Jersey under Sections 11 and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. 211 and 217. The Secretary sought an injunction and damages, alleging that petitioner had violated the minimum wage provisions of the Act (A. 108-109).[2] Petitioner is a New Jersey corporation, consisting of 299 member farms. Its purpose is to arrange for the hiring of farm workers to harvest crops for its members (A. 109). Petitioner recruits most of the workers in Puerto Rico and assigns them to farms when they arrive in New Jersey (*ibid.*). The law of Puerto Rico provides that prospective employers may not recruit Puerto Rican workers for work outside the Commonwealth unless the employers have first negotiated a written agreement containing certain guarantees required by the Secretary of Labor of Puerto Rico.[3] P.R. Laws Ann. tit. 29, §§ 526-534 (1966 & Supp. 1979).

Accordingly, in 1976 and 1977, the years covered by the Secretary's complaint, petitioner negotiated agreements with the Secretary of Labor of Puerto Rico (A. 109, 26-29). The agreements are signed by the employer and the Secretary of Labor of Puerto Rico (A. 27, 29). Each worker signs a statement concurring in the terms of these agreements (*ibid.*). The agreements cannot be "modified, amended, or waived in any regard without the express written agreement

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[2]Section 6 of the Act, 29 U.S.C. (& Supp. III) 206, prescribes the minimum wage that must be paid to various classes of employees, including those involved in this case. The interpretation of Section 6 is not in dispute here. Section 15(a)(2) of the Act, 29 U.S.C. 215(a)(2), makes it unlawful for any person to violate Section 6.

[3]We will refer to respondent Secretary of Labor of the United States as "respondent" or "the Secretary." We will refer to the Secretary of Labor of Puerto Rico by that full title.

of the Employer, the Worker, and the Secretary [of Labor of Puerto Rico]" (A. 26, 28).

The agreements specify terms and conditions of employment comprehensively and in detail (see A. 26-29). They include the hours of work expected of employees and provision for workers' compensation, group life insurance, and other benefits. Article 3 of each of the agreements sets forth the circumstances under which an employee may be discharged; the employer must give notice of a proposed discharge to the appropriate field office of the Migration Division of the Puerto Rico Department of Labor, and a meeting must be held among the employer, the worker, and a field representative of the Puerto Rico Department of Labor to discuss the discharge (A. 26, 28). A discharged worker may complain to the Secretary of Labor of Puerto Rico through the detailed grievance procedures prescribed in Article 12 of the agreements (A. 27, 29). These procedures apply to any worker complaint concerning the breach, application or interpretation of the terms of the agreements (*ibid.*). Article 12 provides that if the Secretary of Labor of Puerto Rico believes that the employer has breached the agreements, he may sue the employer on behalf of the worker (*ibid.*).

Finally, the agreements require the employer to provide lodging of a specified nature at no cost to the workers, and either meals to be paid for by the worker at a specified daily rate or cooking and eating facilities at no cost to the worker (A. 26, 28). They establish the workers' hourly wages (*ibid.*) and provide for workers' transportation to their place of employment (A. 26-27, 28-29). Specifically, petitioner pays the cost of workers' air fare and transportation from Puerto Rico to the member farms (A. 109). Petitioner then exacts these costs from the workers' wages according to a schedule specified in the agreements (*ibid.*). If and only if the workers complete their terms of employ

ment with petitioner, petitioner will repay their transportation costs and pay for transportation back to Puerto Rico (*ibid.*). It is undisputed that this arrangement causes some workers who do not complete their terms of employment to receive cash wages less than the statutory minimum wage (A. 109-110; Pet. 9).

In his complaint, the Secretary alleged that this pay practice violated the Fair Labor Standards Act of 1938. Petitioner raised two defenses based on Section 3(m) of the Act, 29 U.S.C. 203(m).[4] In relevant part, Section 3(m) defines "wages," for purposes of the minimum wage provisions, to include:

> the reasonable cost, as determined by the [Secretary], to the employer of furnishing [an] employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee * * *.

Petitioner asserted, first, that Section 3(m) entitles it to credit transportation costs toward its minimum wage obligation. Second, petitioner contended that its agreement with the Secretary of Labor of Puerto Rico is not a "bona fide collective-bargaining agreement" within the meaning of Section 3(m). Therefore, according to petitioner, the food, lodging, and facilities which that agreement requires it to furnish, without cost, to its workers should be counted toward the workers' minimum wage.

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[4]Section 3(m) was amended effective January 1, 1979, and January 1, 1980. Fair Labor Standards Amendments of 1977, Pub. L. No. 95-151, Section 3(b), 91 Stat. 1249 (codified at 29 U.S.C. (Supp. III) 203(m)). This amendment is not relevant here.

The district court rejected both of petitioner's contentions, and enjoined petitioner from deducting the transportation costs from its employees' wages to the extent the deductions reduced the wages below the statutory minimum, and from offsetting against the minimum wage the value of housing and other facilities provided under the agreement with the Secretary of Labor of Puerto Rico (Pet. App. 2a-3a).[5] On the first issue—whether the transportation costs could be counted against the workers' wages—the court observed that regulations issued by the Department of Labor provide that where the Administrator of the Wage and Hour Division finds that facilities are furnished "primarily for the benefit or convenience of the employer," the costs of furnishing those facilities may not be counted toward the employer's minimum wage obligation. 29 C.F.R. 531.3(d)(1). In particular, the court noted a Department regulation, 29 C.F.R. 531.32(c), which provides that transportation costs are primarily for the benefit of the employer "where such transportation is an incident of and necessary to the employment" (A. 113-114). The court also cited two opinion letters issued by the Administrator of Wages and Hours (A. 114). One letter, issued in 1970, stated: "We have consistently regarded the cost of transporting employees to and from the point of hire as a cost to be borne by the employer, and not the employees, as a cost incidental to the employer's recruiting program. Such transportation cost would not properly be considered as a part of the individual employee's wages under section 3(m) * * * ." Opinion Letter No. 1139, [1969-1973 Transfer Binder] Wages-Hours Admin. Rul. (CCH) para. 30,709 (Dec. 10, 1970). The other letter, issued in 1969, referred to a position the Administrator had also taken in 1960: "[W]e found that the cost of

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[5]Because there were unresolved issues of fact with respect to the extent of damages, the court denied summary judgment on that issue (A. 119).

transporting certain employees to and from the point of hire was normally borne by the [employer] and not the employees as a cost incidental to the recruitment program of the [employer] and, therefore, would not be properly considered as a part of wages." Opinion Letter No. 937, [1966 1969 Transfer Binder] Wages-Hours Admin. Rul. (CCH) para. 30,949 (Feb. 4, 1969).

On the second issue, the district court held that the agreement between petitioner and the Secretary of Labor of Puerto Rico was "the functional equivalent of a collective bargaining agreement" (A. 123). The court rejected petitioner's contention that the proviso in Section 3(m) applies only to collective bargaining agreements negotiated by a representative certified under the National Labor Relations Act, 29 U.S.C. 151 *et seq.* (A. 122-123). The court noted that Department of Labor regulations, 29 C.F.R. 531.6(c), explicitly permit the Administrator of Wages and Hours to treat other agreements, not negotiated under the auspices of the National Labor Relations Act, as collective bargaining agreements for purposes of the Section 3(m) proviso (A. 122). Therefore, the court held, petitioner cannot credit toward the minimum wage the cost of food, lodging, and facilities that the agreements require it to furnish (A. 117; Pet. App. 3a).

The court of appeals summarily affirmed the judgment of the district court (Pet. App. 1a).

ARGUMENT

1. Petitioner contends (Pet. 13-15) that the district court erred in holding that the Act does not permit petitioner to count toward its minimum wage obligations the costs of transporting employees from Puerto Rico to their places of employment in New Jersey. But the district court's holding is fully consistent with, and indeed is based on, regulations and interpretations of the Act issued by the Secretary and

the Administrator of Wages and Hours. Such administrative constructions, as this Court has recently remarked, are "entitled to deference unless [they] can be said not to be a reasoned and supportable interpretation of the Act." *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 (1980). Indeed, in reversing a judgment because the lower court was insufficiently deferential to interpretations of the Fair Labor Standards Act issued by the Administrator, this Court observed that those interpretations are "based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case" and are therefore "entitled to respect." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944). The Court continued:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act * * * constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements * * * .

Id. at 140. Judged by these standards, the decision of the courts below is clearly correct.

Since at least 1960, the Administrator has ruled that the cost of transporting employees from the place of hire to the place of work cannot be credited toward the employer's minimum wage obligation. This interpretation was reaffirmed in detail in 1970. See pages 5-6, *supra*. Petitioner has identified no interpretations issued by the Administrator or the Secretary that are inconsistent with this position, and other regulations construing the Act are in fact fully in accord with this interpretation. See, *e.g.*, 29 C.F.R. 778.217(b)(5)(i). Moreover, since 1960, Congress has amended other portions of Section 3(m) of the Act on several

occasions. See, *e.g.*, Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, Section 13(e), 88 Stat. 64; Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, Section 101(a), 80 Stat. 830. It has never attempted to modify the Secretary's or the Administrator's interpretations of this aspect of Section 3(m). See *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974).

There can also be no doubt that the Administrator's interpretation is reasonable. It is unclear whether petitioner contests the regulation which provides that transportation costs may not be credited toward the minimum wage "where such transportation is an incident of and necessary to the employment." 29 C.F.R. 531.32(c). This regulation is a straightforward application of the rule, which petitioner does not challenge, that the cost of facilities furnished primarily for the benefit of the employer cannot be credited toward the employer's minimum wage obligation. See 29 C.F.R. 531.3(d)(1); Pet. i, 17. Petitioner's business consists of supplying Puerto Rican farm workers to New Jersey farms (Pet. 7-8). Transporting the workers is plainly necessary to this business; indeed, it is integral to it.[6]

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[6]Petitioner argues that the district court erred in granting summary judgment because it raised a factual issue about whether the transportation costs are incurred for its benefit (Pet. 17-19). This argument fails for two reasons. First, when petitioner opposed the Secretary's summary judgment motion in the district court, it did not submit any of the affidavits on which this argument is based. On review of summary judgment, an appellate court will not consider affidavits that were not submitted of record in the trial court. See C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2716, at 435 (1973). Second, petitioner's argument apparently is that the practice of exacting transportation costs from workers' wages enables it to employ poorer workers, thus benefitting the workers, not itself (Pet. 18). But the issue is whether the *transportation* is primarily for petitioner's benefit, not whether the practice of exacting transportation costs from the employees' wages benefits petitioner or the employee. Petitioner's argument amounts to the assertion that by paying less than the minimum wage, it can employ more workers. This is, of course, not a defense to the claim that it has violated the minimum wage laws.

2. Petitioner also asserts (Pet. 15-17) that the proviso to Section 3(m) of the Act does not apply to food, lodging, and facilities it is required to furnish under its agreement with the Secretary of Labor of Puerto Rico. Petitioner's claim is that the term "bona fide collective-bargaining agreement" in the proviso includes only agreements negotiated by a bargaining agent certified under the NLRA.

Petitioner's view conflicts with the language of Section 3(m), the manifest legislative intent, and the consistent administrative interpretation. Congress is able to refer specifically to collective bargaining agreements negotiated under the auspices of the NLRA when it chooses to do so. See, *e.g.*, 29 U.S.C. 185. Congress' decision to refer simply to "collective-bargaining agreement" without reference to the NLRA must, therefore, have been deliberate.[7] In addition, it is implausible to suggest that Congress intended wholly to deny the benefit of the Section 3(m) proviso to all those classes of employees—including agricultural employees—who are not covered by the NLRA. See 29 U.S.C. 152(3). Moreover, as the district court recognized (A. 122) and petitioner concedes (Pet. 13-17), petitioner's position cannot be reconciled with 29 C.F.R. 531.6(c), which authorized the Secretary to treat as collective bargaining agreements some agreements negotiated by representatives other than those certified under the NLRA.

The agreements between petitioner and the Secretary of Labor of Puerto Rico have every essential characteristic of

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[7]Petitioner emphasizes the term "bona fide" in Section 3(m) (Pet. 13-17). But petitioner provides no reason for believing that Congress intended "bona fide" to denote only agreements negotiated according to the NLRA. Petitioner does not suggest that the agreements in issue here are somehow fraudulent, and the district court explicitly found that they are not (A. 123-124).

a collective bargaining agreement. As petitioner acknowledges, the Secretary of Labor of Puerto Rico enters into them on behalf of the employees (Pet. i). See *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 334-335 (1944). The Secretary of Labor of Puerto Rico, not the individual workers, negotiates with the employer. See, *e.g.*, *Asociacion de Trabajadores Agricolas* v. *Green Giant Co.*, 518 F. 2d 130, 133 (3d Cir. 1975); *27 Puerto Rican Migrant Farm Workers* v. *Shade Tobacco Growers Agricultural Association*, 352 F. Supp. 986, 988-989 & n.2 (D. Conn.), aff'd, 486 F. 2d 1052 (2d Cir. 1973). The agreements comprehensively set the terms and conditions of employment and provide a grievance procedure. See page 3, *supra*. The Secretary of Labor of Puerto Rico, like a "labor organization representing employees" covered by the NLRA (29 U.S.C. 185), may sue on behalf of employees for a breach of the agreements. Like a collective bargaining agreement under the NLRA, the agreements between petitioner and the Secretary of Labor of Puerto Rico are "the product of a bilateral relationship which is in large measure compelled by law." R. Gorman, *Labor Law* 540 (1976). For these reasons, the courts below correctly held that these agreements are "bona fide collective-bargaining agreement[s]" within the proviso to Section 3(m). It follows that petitioner may not credit toward its minimum wage obligation the cost of food, lodging, and facilities which these agreements require it to furnish in addition to wages.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

DOJ-1981-03